IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1371 OF 2006

Rajesh @ Raja Nana Patil,
aged about 32 years,
residing at room no.206,
2nd floor, Shivamrut Apartment,
Veer Savarkar Nagar,
Opp.Shivsena Shakha,
Thane (W)
at present in judicial custody
and lodged at Thane Central
Prison, Thane. ..**Petitioner.**
Petitioner

Vs

1. State of Maharashtra,
at the instance of the
Senior Inspector of Police
Vartak Nagar Police Station,
Thane vide their C.R.No.I-43/2005)

2. Tarashankar Anirudhnarayan Mishra,
residing at Jeevan Sangram Maidan,
Behind Suryavanshi Kirana Store,
Manorama Nagar, Thane (W) .. **Respondents.**

Mr S.R.Chitnis, senior counsel, with Mr Nitin Sejpal and Ms Pooja Bhojne, for the petitioner.

Mrs M.H.Mhatre, APP, for the respondent no.1-State.

CORAM : D.B.BHOSALE, J.
DATED : 25th July, 2006

ORAL JUDGMENT:

1. Heard Mr Chitnis, learned senior counsel for the petitioner and Ms Mhatre, learned APP, for respondent no.1.

2. This petition is directed against the order dated 19th June, 2006 passed by IIIrd Adhoc

Addl.Sessions Judge, Thane, on the application at Exhibit-15 in Sessions Case No.241 of 2005 filed under section 319 of the Criminal Procedure Code. By that application, the petitioner has prayed for proceeding against PW 2 - Tarashankar Mishra, an eye-witness, as an accused since it appears from the evidence that he has also committed the offence for which he could be tried together with the petitioner-accused in the aforesaid sessions case. The application at Exhibit-15 was filed at the stage when PW 2 was being cross-exmamined by the petitioner during trial. The petitioner along with others is charged of the offence punishable under section 302 read with section 34 of IPC.

3. Mr Chitnis, learned senior counsel for the petitioner, at the outset, invited my attention to the FIR and the depositions of PW 1 and PW 2 to contend that PW 2 was also involved in the alleged offence and that is clear from the evidence of the complainant and the witness (PW 2) himself. The evidence of these two witnesses, according to Mr Chitnis, prima facie, conclude that PW 2 ought to have been arraigned as an accused since he also participated in the commission of the crime. In support of this contention, Mr Chitnis relied upon the judgments of the Apex Court in Girish Yadav and Ors Vs. State of MP, 1996 SCC (Cri)

552 and Rakesh and Anr Vs. State of Haryana, 2001 Supreme Court Cases (cri) 1090. On the other hand, Ms Mhatre, learned APP, submitted that it is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. What is required is the reasonable satisfaction from the evidence already collected that the other person has committed an offence and that such person too as well should be tried along with the already arraigned accused. In support of this submission, she placed reliance upon the judgment of the Apex Court in Machael Machado Vs CBI, 2000 Supreme Court Cases (Cri) 609.

4. The alleged incident occurred at 4- 4.30 am, on 5th January, 2005 on the terrace of the house where PW 1 with his family was residing. At the relevant time, PW 1, on hearing noise, went on the terrace and found that the petitioner-accused was assaulting another person, who was lying on the floor and the third person was standing next to him. It appears that the 3rd person was a riksha driver P.W.2, who according to Mr.Chitnis, also participated in the assault. In support of this contention, my attention was drawn to the deposition of PW 1. It would be advantageous to reproduce as to what PW 1 has exactly stated in the examination-in-chief to appreciate the

submission of Mr Chitnis. The relevant portion from the examination-in-chief of PW 1 reads thus:

> ".. ... Therefore, I proceeded towards terrace. I had seen one person was lying on terrace and another person was assaulting him on his face by means of shoes. Another person was standing near first person who was assaulting the person who was lying on the terrace. I asked that person who was assaulting another person why he is assaulting that person. Thereupon, that person told me that he is a police. I am discharging my duty and he further told me that I should go from terrace. Accordingly, I came down from terrace. Within five to ten minutes, these two persons came down on the ground floor of the building. My grand father told these two persons that they should take the person to whom they had assaulted. These two persons replied that they have made telephone call, vehicle will come. Thereafter, my grand father again asked these two persons how he can identify that these both persons are police. The person who was assaulting the another person on terrace had shown one pink coloured identity card to my grand father. My grand father had seen that identity card, name R.R.Patil was scribed on that I-card. The person who had shown this identify card to my grand father who is present before Court is same. Accused had snatched his I-card from the hands of my grand-father. Thereafter, both of them went away in one rickshaw in which they had been to our building.
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> 2. After ten to fifteen minutes, one person who had assaulted the person on terrace came back in rickshaw towards our building, and another person came towards our building on his motor-cycle. I again say, accused along with driver of rickshaw had been to our building, and another person came on his Yamah Motor cycle towards our building. The person who came on motor-cycle,

> proceeded on the terrace of our building, and within 2-3 minutes, he came down on the ground floor of the building. Thereafter, accused along with rickshaw driver went away from their rickshaw and the person who had come on his motor cycle, also left the spot. Thereafter, I went inside my house...."
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> (emphasis supplied)

In the cross-examination and in particular paragraph 8 thereof in respect of the alleged assault, he has deposed as follows.

> ".... .. It did happen that I had seen three unknown persons on terrace. It is correct, one unknown person was lying on the floor of terrace. It did happen I had asked the two unknown persons why they are assaulting third person. it did happen that both unknown persons told me that they are policemen and I should go towards my house. Accordingly, I came down from terrace. It is correct, I had disclosed this fact to my maternal uncle and grand father. It did happen that when these two unknown persons were started coming down from terrace, that time, my grand father told these two unknown persons that they should take the person to whom they had assaulted. It did not happen that these two unknown persons told that they are policemen and they had called vehicle. It did not happen that my grand-father asked both unknown persons that how both of them are claiming as police. It is correct, my complaint was recorded on 5th January, 2005, as per my say. It was typed complaint. My complaint was read over to me. Portion marked A is written correctly in my complaint. It is correct these both unknown persons had not worn police uniform.
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> 9. It did happen that I had lodged complaint against two unknown persons in

> respect of assaulting one of the unknown persons. It did happen that I had mentioned that description of two unknown persons in my compliant.
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> 10. It did happen that after the incident, after some time, fourth unknown person had been to the spot of incident. It did happen that fourth unknown person proceeded on terrace. He had seen the unknown person was lying on the floor of terrace and again went back. It did not happen that fourth unknown person was having a Tila on his fore-head. The person who was having Tila on his forehead, was a rickshaw driver. I had seen him. It did happen that I came to know three days after the incident that person who was having Tila on his fore-head was rickshaw driver. It did happen that 3 days after the incident, it was revealed to us that the unknown person who was having Tila on his forehead was a rickshaw driver. That time, myself, my maternal uncle and grand father were called in police station. It did happen that I came to know from police that person who was having Tila is a rickshaw driver. It did happen one unknown person was not police who was out of two assaulting persons. It did happen after the incident, I had identified one of the persons who is assailant before the Court."
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> (emphasis supplied)

A bare perusal of the examination-in-chief clearly demonstrates that when PW 1 went on the terrace, he saw two persons together out of which one was assaulting a person lying on the floor. He did not know who were they at the relevant time and the situation was such that PW 1 must have thought that both were together and, therefore, at places in his deposition, he has referred

them both together by using pronoun "they", as if they both played equal role in the commission of the offence. It may be true that both were seen together and they left the scene of offence together. But, that by itself would not be sufficient to infer that the riksha driver also had common intention in commission of the offence. On the contrary from the testimony of both, PWs 1 and 2, it is clear that he (PW 2) had no reason to share common intention to assault the deceased and in fact he did not do so. Merely because the witness in the cross-examination has used the pronoun "they", in my opinion, would not be sufficient to hold that both were involved in the alleged offence. It cannot be accepted that every query made by PW 1 or his grand father, was replied by both, i.e. accused and PW 2-riksha driver together in chorus. The witness seems to have used the word "both" probably because they both were together. What the riksha driver PW 2 in his evidence has stated is also relevant. The relevant portion reads thus:

> ".... ... Thereafter, accused and that passenger had occupied seat in my rickshaw. Accused told me to take rickshaw towards Kapurwadi police station. That time, police mobile van had left the spot. When I was taking turn for proceeding towards Kapurbavadi police station that time, accused told me not to take the rickshaw towards police station and take the rickshaw at one side of the road. Therefore, I had taken rickshaw near mosque. Thereafter,

> accused gave 2-3 fist blows to the passenger. Thereafter, that passenger got down from the right side of my rickshaw and ran away by the lane of Paper Product Company. Thereafter, accused told me to start the rickshaw and chased the passenger. Thereafter, I had taken accused in my rickshaw and went backside of Rajdhani hotel after the said passenger. There is one storied building on the left side of the road. The passenger proceeded on the terrace of that one storied building. Accused also got down from my rickshaw and proceed towards that one storied building in order to catch that passenger. By that time, passenger proceeded on the terrace of that one stories building. Accused also went on the terrace of that one storied building. I had wanted near rickshaw for five minutes. Thereafter, I proceed on terrace of one storied building in order to see whether accused is coming back. When I had been to terrace that time, I had seen that accused was assaulting that passenger by means of kick blows and that passenger was lying on the floor. When accused was assaulting that passenger by means of kick blow that ... .. "

After reading the evidence of the riksha driver, it is clear that his riksha was engaged by the accused in which the accused and the third person who was assaulted, went together to some distance. In the riksha also the accused allegedly assaulted to the third person. After the riksha was stopped he started running when the accused chased him. Both went on the terrace and there the alleged incident occurred. After some time, the riksha driver went on the terrace to see whether they were coming back and that is how he reached

the terrace and was seen by PW 1 along with the accused and the deceased. Merely because he carried the accused and the third person in his riksha and was seen on the terrace, would not be sufficient to proceed against him under section 319 of Cr.P.C.

5. At this stage, it would be advantageous to refer to what Supreme Court in **Machael Machado Vs CBI**, (supra) while dealing with the provisions of Section 319 has observed. The relevant observations in paragraphs 11 and 12 read thus:

> 11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with already arraigned accused."
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> 12. But even then, what is conferred on the court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court

> should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons."

It is thus clear that the basic requirements for invoking section 319 is a reasonable satisfaction of the Court from the evidence already collected that the other person has committed an offence and that for such offence that other person could as well be tried along with the already arraigned accused. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. Section 319 of Cr.P.C confers on the court a discretion, which court should exercise only on being satisfied from the evidence that other person could as well was involved in the commission of the offence. From the evidence of PW 1 and PW 2 and in particular the portion of the evidence quoted above I am satisfied that it is not enough to draw even a prima facie opinion that PW 2, the riksha driver, committed an offence and that for the alleged offence he could as well be tried along with the accused (R.R.Patil). The judgments relied upon by Mr Chitnis, in my opinion, are of no avail to the

petitioner even though the prepositions laid down in those judgments are applied to the facts of the present case. In the circumstances, this writ petition is dismissed. Certified copy expedited.

(D.B.BHOSALE,J.)

HIGH COURT
CIVILI APPELLATE SIDE

CRIMINAL WRIT PETITION NO.1371 OF 2006

Date of Judgment:

25th July, 2006

For approval and signature

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?